IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

VERSUS CRIMINAL NO. 2:93CR183-S-0

THOMAS MORRIS, DEFENDANT.

ORDER GRANTING DEFENDANT'S
MOTION FOR JUDGMENT OF ACQUITTAL

This cause is before the court on the motion of the defendant, Thomas Morris, for a judgment of acquittal, or alternatively, for a new trial. On July 27, 1994, a district-wide jury sitting in Oxford, Mississippi, returned a guilty verdict as to Count IV of the indictment, knowingly making a false material declaration to a grand jury. The defendant was found not guilty on Count III. The jury was unable to agree on verdicts as to Counts I, II and V. The court declared a mistrial as to those counts. The court has thoroughly reviewed the parties' briefs, and having heard oral argument, is now prepared to render this order.

Standard of Review

On a motion for judgment of acquittal, the court is not to assess credibility, weigh evidence, or draw inferences. United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir. 1979). The court must view the evidence most favorable to the government, and should determine whether a reasonably minded jury would have had a reasonable doubt. United States v. De Jean, 613 F.2d 1356, 1358 (5th Cir. 1980).

Facts

Count IV of the indictment alleges that Thomas Morris perjured himself three separate times in the following grand jury testimony:

> Q. Now, when New Independent Builders bought from you and they assumed the two hundred 20 thousand note or mortgage, what was the sale price that they were paying you for the apartments?
>
> A. They were going to assume that plus we take a second mortgage on it, the first mortgage with Cleveland Federal and D and N took a second with them for -- I have given you the notes.
>
> Q. 38 thousand five hundred dollars?
>
> A. Including interest and principal.
>
> . . . .
>
> Q. So, in other words, when they brought the property from you they were assuming the existing mortgage of about two hundred 20 thousand dollars, in addition they were paying you 38 thousand five hundred dollars which you were going to finance yourself. I mean what's called a purchase money mortgage, something like that?
>
> A. Yes, sir.
>
> Q. So in other words they were paying you 38 thousand five hundred dollars, you were financing that, allowed them to pay you over a period of time?
>
> A. That's correct.
>
> (1 & 3) . . . .
>
> Q. <u>With regard to the sale of that property to new Independent Builders, Incorporated, did they pay anything other than the assumption of the note and the deed of trust to pay 38 five, did they pay anything other than that?</u>
>
> A. <u>No, not to my knowledge.</u>
>
> . . . .
>
> (2) Q. Now, this Cypress Woods Apartments, is that the only transaction you were involved with them, <u>you either bought from New Independent Builders or the principals or sold property to them? Have you had any other financial transactions with them other than that?</u>

A. As relates to property, no. I represented Rod and Danny in a criminal matter.

Q. In Greenville?

A. Sometime earlier.

Q. Would that have been in 89?

A. I don't recall.

(2 & 3)

Q. But other than that you ever involved in any financial transaction with the people we talked about, the principals?

A. Not to my knowledge, unless someone in the office.

From these exchanges, the government alleges that the defendant committed perjury by falsely answering or not revealing that:

1. he had received $90,000.00 in cash from the Williams drug ring in connection the sale of the Cypresswoods Apartments;

2. he received $10,000.00 in cash from Rod Williams and delivered to Williams' associates a bank cashier's check for $9,000.00;

3. he received $10,000.00 in cash from an associate of Rod Williams to be used to pay taxes and insurance on the Cypresswoods Apartments.

These are the three allegations of perjury which have been combined into Count IV.

Discussion

The court finds that the verdict of guilty as to Count IV should be set aside, and a judgment of acquittal ordered as to this count. Three separate innocuous components have converged to cause the guilty verdict of Count IV to fall into disrepute. First, Title 18 U.S.C. § 1623 provides that it shall be unlawful for anyone "...under oath...in any proceeding before or ancillary to

any court or grand jury of the United States knowingly makes any false material declaration...." The petit jury's inquiry focused on the state of mind of the defendant at the time of his answers. Did the defendant believe that his responses to the questions were truthful? Second, Count IV contains three separate charges of alleged perjurious answers. The court specifically instructed the jury that they must unanimously agree on an allegation of perjury in order to return a guilty verdict as to that allegation, but that they did not necessarily have to agree on all of the allegations of perjury within Count IV. Finally, because of the general verdict, the court does not know to which allegation or allegations the jury unanimously agreed.

There are three types of questions: clear, arguably ambiguous, and fundamentally ambiguous. A false response to the first type of question will support a perjury conviction. A false response to arguable ambiguous questions requires the probing of the trier of fact to determine whether the defendant committed perjury. "It is the role of the fact-finder to determine whether the defendant understood the question propounded to him and intentionally lied." Springer v. Coleman, 998 F.2d 320, 322 (5th Cir. 1993). A false response to fundamentally ambiguous questions requires the court to remove the allegation of perjury from consideration by the jury, since as a matter of law a perjury conviction cannot stand upon the question and answer. The Fifth Circuit does not refer to the third type of question as "fundamentally ambiguous," but as "so ambiguous and imprecise to

preclude a guilty verdict." See United States v. ADI, 759 F.2d 404 (5th Cir. 1985); United States v. Calimano, 576 F.2d 637 (5th Cir. 1978); United States v. Lighte, 782 F.2d 367 (5th Cir. 1986) (use of fundamentally ambiguous). Either finding requires that as a matter of law a guilty verdict cannot stand.

The court finds that if the jury concluded that the defendant did receive $90,000.00 cash as part of the purchase of the Cypresswoods Apartment, as was testified to by several members of the Williams organization, then clearly the defendant committed perjury when he responded to the question regarding the total sales price of Cypresswoods. The court is not concerned with the seemingly inconsistent guilty verdict of Count III. It is settled law that verdicts rendered in a single trial do not have to be consistent. See United States v. Morris, 974 F.2d 587 (5th Cir. 1992); United States v. Pena, 949 F.2d 751 (5th Cir. 1991). But the court does not know whether this was the allegation and the only allegation upon which the jury unanimously agreed.

The second allegation of perjury is based upon the fact that the defendant acting as attorney for the Williams organization took $10,000.00 in cash and transferred it through a shell corporation know as Kim Development, Inc. From this money, one thousand dollars supposedly was retained by the defendant as a laundering fee and the other nine thousand dollars was used to purchase a convenience store. The government argues that the defendant committed perjury when he failed to testify about the Kim Development, Inc. The grand jury was attempting to discover

whether there had been any transactions between the defendant and the Williams organization other than the Cypresswoods Apartments. The defendant responded that there had not been any with regards to property, but that he had represented Rod and Danny Williams in a criminal matter. This is a true statement. The defendant did not purchase the convenience store from the Williams organization nor did he sell it to the Williams organization. He simply acted as their attorney in the transfer of the money to the sellers. Next the defendant was asked: "But other than that you ever involved in any financial transaction with the people we talked about, the principals?" He responded: "Not to my knowledge...." Again this is true, since he was not involved in the sense of being either a buyer or seller, but was only acting as an attorney. Due to the obvious confusion as to which role the grand jury was asking, this response simply cannot sustain a guilty verdict. See United States v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986) (questions failed to differentiate between acts as trustee and those in individual capacity).

The third allegation of perjury arises from testimony at trial that the Williams organization had given the defendant $10,000.00 to pay taxes and purchase insurance on the Cypresswoods Apartments; yet the defendant stated that the only money involved in the transaction was the assumption of the $220,000.00 note and a second mortgage for $38,500.00. Taxes and insurance, unless specified, are not considered part of the selling price of property. Accordingly, the defendant's response was correct. Typically, the

question of taxes and insurance arises during the closing of a deal, but it would certainly be a stretch to hold someone criminally liable for failing to include such payment with the purchase price of the property. The questioner could have easily been more specific in order to ferret out other possible payments of cash from the Williams organization to the defendant. Thus, the final allegation of perjury also is so ambiguous and imprecise to preclude a guilty verdict.

The purpose of the defendant appearing before the grand jury was in relation to an investigate of the Williams Drug Ring. Although money laundering is part and parcel of any major drug operation, the prosecution should not be so quick in its pursuit that it inflicts injury upon the grand jury as an institution of inquiry.

> ...the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts.

See J. Wigmore, Evidence 275-276 (3d Ed. 1940) (cited in Bronston v. United States, 409 U.S. 352, 359 (1973)). Just as perjury inhibits the investigatory purpose of a grand jury inquiry, so do unwarranted charges of perjury. Few witnesses would willingly appear before a grand jury if they felt their truthful responses to ambiguous questioning would subject them to perjury charges. This court is mindful of the vital role the grand jury plays, and seeks to balance the integrity of the grand jury process with the rights of those who appear before it. The court believes error should be may on the side of the witness.

It is necessary to reiterate the logic expressed in Bronston:

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it.
>
> . . . .
>
> It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

Bronston, 409 U.S. at 358-359. "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Id. at 360. "Precise questioning is imperative as a predicate for the offense of perjury." Id. at 362.

Conclusion

The prosecution choose to bring three allegations of perjury within Count IV of the indictment. The court concludes that two of the allegations, when viewed in the context of the complete line of questioning, were based upon questions and responses which are so ambiguous and imprecise that a guilty verdict is precluded. The jury may have unanimously agreed upon the one allegation which is not fundamentally ambiguous, but since a general verdict was delivered the court cannot be sure.

Accordingly, IT IS ORDERED,

That the defendant's motion for judgment of acquittal is granted, and the jury verdict of guilty returned as to Count VI is

stricken, and a judgment of acquittal as to Count VI is ordered to be entered.

SO ORDERED, this the _____ day of September, 1994.

_____
CHIEF JUDGE